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No. 98-156

In The

Supreme Court of the United States

October Term, 1997

ROBERT MORRIS,

Petitioner,

v.

COOPER STEVEDORING COMPANY AND INSURANCE COMPANY OF NORTH AMERICA,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Petitioner filed a claim for benefits under the Longshore and Harbor Workers' Compensation Act and that claim was denied after a hearing before an Administrative Law Judge. Petitioner appealed the ALJ's decision to the Benefits Review Board and the ALJ's decision was affirmed by operation of a congressional statute, which expressly stated that the ALJ's decision was the Board's final order for purposes of appeal to the federal Courts of Appeals. Another federal statute required the Petitioner to file an appeal to the appropriate federal Court of Appeals within 60 days after the Board's final order. When the Petitioner failed to file his appeal within 60 days of the statutory affirmance, did the Court of Appeals properly dismiss the appeal for lack of jurisdiction?

LIST OF ALL PARTIES

The parties to this case are Robert Morris, the Petitioner, and Cooper Stevedoring Company and Insurance Company of North America, Respondents. As required by Rule 29.6 of this Court, the Respondents provide the following information:

(1) Cooper Stevedoring Company was succeeded by Cooper/T. Smith Stevedoring Co., Inc. The parent corporation of Cooper/T. Smith Stevedoring Co., Inc. is Cooper/T. Smith Corporation. The following are non-wholly owned subsidiaries of Cooper/T. Smith Stevedoring Co., Inc.: Tadco, Inc.; Husky Terminal and Stevedoring, Inc.; Gulf Services, Inc.; Gateway Terminals, Inc.; Transbay Container Terminals; KIC Acquisition Co.; and Cooper/Servport Ltda.

(2) The parent corporation of Insurance Company of North America is INA Holdings Corporation. Insurance Company of North America has no subsidiaries that are non-wholly owned.

TABLE OF CONTENTS

Page

QUESTION PRESENTED FOR REVIEW i

LIST OF ALL PARTIES ii

TABLE OF CONTENTS iii

TABLE OF CITED AUTHORITIES iv

OPINIONS BELOW 1

STATUTES AND REGULATIONS INVOLVED IN THIS CASE 1

STATEMENT OF THE CASE 4

REASONS FOR DENYING THE PETITION 6

CONCLUSION 20

TABLE OF CITED AUTHORITIES

Page

CASES:

Adkins v. Director, OWCP, 889 F.2d 1360 (4th Cir. 1989) 7, 10

Bolling v. Director, OWCP, 823 F.2d 165 (6th Cir. 1987) 19

Brown v. Director, OWCP, 864 F.2d 120 (11th Cir. 1989) 10

Brown v. Gardner, 513 U.S. 115 (1994) 17

Clay v. Director, OWCP, 748 F.2d 501 (8th Cir. 1984) ..7, 10

Continental Terminals v. Director, OWCP, No. 96-4175, 125 F.3d 843 (Table), 1997 U.S. App. LEXIS 28523 (Text) (2d Cir. Oct. 9, 1997) 12

Cooley v. Director, OWCP, 895 F.2d 1301 (11th Cir. 1990) 19

Danko v. Director, OWCP, 846 F.2d 366 (6th Cir. 1988) 10

Director, OWCP v. Sun Ship, Inc., No. 96-3648, 1998 WL 423785 (3d Cir. July 29, 1998) 8, 13

Felt v. Director, OWCP, 11 F.3d 951 (9th Cir. 1993) 7, 10, 19

Hall v. Consolidated Employment Systems, Inc., 139 F.3d 1025 (5th Cir. 1998) 12

Jones Stevedoring Co. v. Director, OWCP, 133 F.3d 683 (9th Cir. 1997) 12

LeBlanc v. Cooper/T. Smith Stevedoring, Inc., 130 F.3d 157 (5th Cir. 1997) 8

TABLE OF CITED AUTHORITIES – Continued

Page

Pittston Stevedoring Corp. v. Dellaventura, 544 F.2d 35 (2d Cir. 1976), *aff'd on other grounds sub nom. Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249 (1977) 7, 10

Seaward Marine Services, Inc. v. Director, OWCP, No. 96-2661, 131 F.3d 136 (Table), 1997 U.S. App. LEXIS 34138 (Text) (4th Cir. Dec. 4, 1997) 9

Shell Offshore, Inc. v. Director, OWCP, 122 F.3d 312 (5th Cir. 1997), *cert. denied*, 118 S. Ct. 1563 (1998) 8

Shendock v. Director, OWCP, 893 F.2d 1458 (3d Cir.) (en banc), *cert. denied*, 498 U.S. 826 (1990) 19

Stevedoring Services of America v. Director, OWCP, 29 F.3d 513 (9th Cir. 1994) 10, 19

Washington Metropolitan Area Transit Authority v. Beynum, 145 F.3d 371 (D.C. Cir. 1998) 8

STATUTES:

The Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, 1996 U.S.C.C.A.N. (110 Stat.) 1321, 1321-219, *amended by* Act of May 2, 1996, Pub. L. No. 104-140, 1996 U.S.C.C.A.N. (110 Stat.) 1327 ..... *passim*

Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-950 ..... 2, 4, 7, 13

33 U.S.C. § 921(c) 2, 3, 6, 7

REGULATIONS:

20 C.F.R. § 802.403 ..... 3, 14, 15

20 C.F.R. § 802.407 ..... 3, 14, 15, 16, 17

TABLE OF CITED AUTHORITIES – Continued

Page

RULES:

Sup. Ct. R. 10 6

Sup. Ct. R. 29.6 ii

OPINIONS BELOW

None of the opinions and judgments delivered by the courts below have been reported. A copy of the Notice from the Clerk of the Benefits Review Board, dated September 12, 1996, affirming the ALJ's denial of benefits, is reprinted in Appendix C to the Petition for Writ of Certiorari (p. 3a). A copy of the Order of the Benefits Review Board, dated October 22, 1996, denying the Petitioner's request for reconsideration, is reprinted in Appendix D to the Petition for Writ of Certiorari (p. 9a). A copy of the Order of the United States Court of Appeals for the Fifth Circuit, filed March 18, 1998, granting Respondents' motion to dismiss the appeal, is reprinted in Appendix A to the Petition for Writ of Certiorari (p. 1a). A copy of the Order of the United States Court of Appeals for the Fifth Circuit, filed April 27, 1998, denying Petitioner's motion for reconsideration, is reprinted in Appendix B to the Petition for Writ of Certiorari (p. 2a).

STATUTES AND REGULATIONS INVOLVED IN THIS CASE

The statutes and regulations involved in this case and their pertinent text are as follows:

(1) The Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, 1996 U.S.C.C.A.N. (110 Stat.) 1321, 1321-219, *amended by* Act of May 2, 1996, Pub. L. No. 104-140, 1996 U.S.C.C.A.N. (110 Stat.) 1327:

Provided further, That no funds made available by this Act may be used by the Secretary of Labor after September 12, 1996, to review a decision under the Longshore and Harbor Workers' Compensation Act (33 U.S.C. 901 et seq.) that has been appealed and that has been pending before the Benefits Review Board for more than 12 months, except as otherwise specified herein: *Provided further,* That any such decision pending a review by the Benefits Review Board for more than one year shall, if not acted upon by the Board before September 12, 1996, be considered affirmed by the Benefits Review Board on that date, and shall be considered the final order of the Board for purposes of obtaining a review in the United States courts of appeals: *Provided further,* That beginning on September 13, 1996, the Benefits Review Board shall make a decision on an appeal of a decision under the Longshore and Harbor Workers' Compensation Act (33 U.S.C. 901 et seq.) not later than 1 year after the date the appeal to the Benefits Review Board was filed; however, if the Benefits Review Board fails to make a decision within the 1-year period, the decision under review shall be considered the final order of the Board for purposes of obtaining a review in the United States courts of appeals.

(2) 33 U.S.C. § 921(c).

This statute is reproduced in Appendix E to the Petition for Writ of Certiorari (pp. 15a, 16a-17a).

(3) 20 C.F.R. § 802.403:

§ 802.403 Issuance of decisions; service.

(a) The Board shall issue written decisions as expeditiously as possible after the completion of review proceedings before the Board. The transmittal of the decision of the Board shall indicate the availability of judicial review of the decision under section 21(c) of the LHWCA when appropriate.

(b) The original of the decision shall be filed with the Clerk of the Board. A copy of the Board's decision shall be sent by certified mail or otherwise presented to all parties to the appeal and the Director. The record on appeal, together with a transcript of any oral proceedings, any briefs or other papers filed with the Board, and a copy of the decision shall be returned to the appropriate district director for filing.

(4) 20 C.F.R. § 802.407:

§ 802.407 Reconsideration of Board decisions.

(a) Any party-in-interest may, within 30 days from the filing of a decision or non-interlocutory order by a panel or the Board pursuant to § 802.403(b), request reconsideration of such decision by those members who rendered the decision. The panel of members who heard and decided the appeal will rule on the motion for reconsideration. If any member of the original panel is unavailable, the Chairman shall designate a new panel member.

STATEMENT OF THE CASE

This appeal involves a claim for benefits under the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. §§ 901-950. On June 24, 1980, while engaged in work as a longshoreman at the Port of Houston, the Petitioner sustained an injury to his back. He filed a claim for benefits under the LHWCA, and that claim was tried before an Administrative Law Judge, who rendered a decision awarding specified benefits to the Petitioner. One of the issues litigated at the formal hearing before the ALJ was the calculation of the Petitioner's average weekly wage at the time of his injury. However, the Petitioner was dissatisfied with the ALJ's determination of that issue, and he appealed the determination first to the Benefits Review Board and then to the United States Court of Appeals for the Fifth Circuit, both of which affirmed the ALJ's findings and calculation.

Remaining dissatisfied with the calculation of his average weekly wage, the Petitioner attempted to do indirectly what he had been unable to do directly. He requested a modification of the ALJ's decision, pursuant to Section 22 of the LHWCA. When the District Director of the Office of Workers' Compensation Programs denied the Petitioner's request for modification, the Petitioner then had the request for a modification referred to a formal hearing before another ALJ. The second ALJ held a formal hearing on the modification request and issued a decision and order denying that request.

In mid-March 1995, the Petitioner filed an appeal of the second ALJ's decision and order to the Benefits Review Board. Over a year later, on September 12, 1996,

the ALJ's decision and order was statutorily affirmed by operation of Public Law 104-134, and became the final order of the Board for purposes of appeal. As a result, on that date the Clerk of the Board issued a Notice to the parties stating that the ALJ's decision was affirmed under Public Law 104-134. (App. C, p. 3a).[1] Despite the Notice's declaration that the Board's order was final, despite the express pronouncement of Public Law 104-134 that the ALJ's decision and order was the Board's final order for purposes of appellate review, and despite the fact that the purpose and effect of Public Law 104-134 were to prevent further review by the Board, the Petitioner filed a motion for reconsideration of the Board's order. In an Order dated October 22, 1996, the Board explained that it did not have authority to conduct any further review of the case and therefore denied the request for reconsideration. (App. D, p. 9a). Although Section 21 of the LHWCA required the Petitioner to file an appeal of the Board's final order within 60 days after the order was issued, the Petitioner delayed until December 16, 1996, over 90 days after September 12, 1996, to file his petition for review, seeking once again to have the United States Court of Appeals for the Fifth Circuit review his average weekly wage calculation.

The Respondents moved the Court of Appeals to dismiss the Petitioner's appeal, on the ground that the petition for review was not timely filed and therefore the Court lacked jurisdiction. The Court granted the motion to dismiss (App. A, p. 1a), whereupon the Petitioner filed

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[1] All Appendix references in this Brief are to the Appendices in the Petition for Writ of Certiorari.

a motion for reconsideration, which the Court denied (App. B, p. 2a). The Petitioner now seeks review by this Court.

REASONS FOR DENYING THE PETITION

The Petition for Writ of Certiorari should be denied because the Court of Appeals properly dismissed the Petitioner's appeal. The Petitioner's petition for review to the Court of Appeals was not timely filed and as a result the Court did not have jurisdiction over the appeal. In addition, the Petition for Writ of Certiorari should be denied because the Petitioner has not demonstrated a compelling reason for the Court to exercise its discretionary review of this case. The Petitioner has not demonstrated that this case involves an important federal question or similar compelling matter requiring this Court's attention. *See* Sup. Ct. R. 10. In fact, the Petition for Writ of Certiorari does not contain even a single case citation.

Section 21(c) of the LHWCA sets forth the procedure by which a petitioner may obtain a Court of Appeals' review of an order issued by the Benefits Review Board:

> **(c) Court of appeals; jurisdiction; persons entitled to review; petition; record; determination and enforcement; service of process; stay of payments**
>
> Any person adversely affected or aggrieved by a final order of the Board may obtain a review of that order in the United States court of appeals for the circuit in which the injury occurred, by filing in such

> court within sixty days following the issuance of such Board order a written petition praying that the order be modified or set aside.

33 U.S.C. § 921(c). All the Courts of Appeals that have examined this provision have held that a Court of Appeals does not have jurisdiction over the appeal if the petition for review is not filed within sixty days of the issuance of the Board's final order. *See, e.g., Felt v. Director, OWCP*, 11 F.3d 951, 952 (9th Cir. 1993); *Adkins v. Director, OWCP*, 889 F.2d 1360, 1361-63 (4th Cir. 1989); *Clay v. Director, OWCP*, 748 F.2d 501, 503 (8th Cir. 1984); *Pittston Stevedoring Corp. v. Dellaventura*, 544 F.2d 35, 42-44 (2d Cir. 1976), *aff'd on other grounds sub nom. Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249 (1977). These courts recognize that the Court of Appeals "is a court of limited jurisdiction," and "may review decisions of the Benefits Review Board only when appeals are brought to [it] under the conditions and within the time specified by statute." *Adkins*, 889 F.2d at 1361.

The Board's final order for purposes of appeal was issued on September 12, 1996. The Omnibus Consolidated Rescissions and Appropriations Act of 1996 expressly curtailed the Benefits Review Board's authority to review an ALJ's decision under the LHWCA:

> [N]o funds made available by this Act may be used by the Secretary of Labor after September 12, 1996, to review a decision under the Longshore and Harbor Workers' Compensation Act (33 U.S.C. 901 et seq.) that has been appealed and that has been pending before the Benefits Review Board for more than 12 months, except as otherwise specified herein: *Provided further,*

> *That any such decision pending a review by the Benefits Review Board for more than one year shall, if not acted upon by the Board before September 12, 1996, be considered affirmed by the Benefits Review Board on that date, and shall be considered the final order of the Board for purposes of obtaining a review in the United States courts of appeals. . . .*

Pub. L. No. 104-134, 1996 U.S.C.C.A.N. (110 Stat.) 1321, 1321-219, *amended by* Act of May 2, 1996, Pub. L. No. 104-140, 1996 U.S.C.C.A.N. (110 Stat.) 1327 (emphasis added). The Appropriations Act is, in effect, an amendment to the LHWCA, addressing the finality of decisions under the LHWCA and altering its provisions. *See Washington Metro. Area Transit Auth. v. Beynum,* 145 F.3d 371, 373 (D.C. Cir. 1998). Thus, by the clear pronouncement of the Appropriations Act, the Benefits Review Board had no authority after September 12, 1996 to review a decision of an ALJ that had been pending on appeal for more than one year. If, as of September 12, 1996, an ALJ's decision was pending before the Board for over one year, it was deemed automatically affirmed by the Board and was "considered the final order of the Board for purposes of obtaining a review in the United States courts of appeals." *LeBlanc v. Cooper/T. Smith Stevedoring, Inc.*, 130 F.3d 157, 159 n.2 (5th Cir. 1997); *Shell Offshore, Inc. v. Director, OWCP*, 122 F.3d 312, 315 (5th Cir. 1997), *cert. denied*, 118 S. Ct. 1563 (1998). In fact, in the very recent case of *Director, OWCP, v. Sun Ship, Inc.*, No. 96-3648, 1998 WL 423785 (3d Cir. July 29, 1998), the Court of Appeals held that any action taken by the Benefits Review Board after the case has been statutorily affirmed under the Appropriations Act is a nullity.

In the present case, the Petitioner filed his appeal with the Benefits Review Board in March 1995, with respect to the second ALJ's decision and order. However, as of September 12, 1996, approximately a year and a half after the appeal was filed, the Board had taken no action on the appeal. Consequently, the second ALJ's decision and order was deemed affirmed as of September 12, 1996 by Public Law 104-134 and was considered the final order of the Board for purposes of an appeal to the United States Court of Appeals for the Fifth Circuit. The Clerk of the Board issued a Notice to all the parties on September 12, 1996, which stated that the ALJ's decision was statutorily affirmed and was the final order of the Board for purposes of an appeal. (App. C, p. 3a).

Although the final order of the Board was issued on September 12, 1996, the Petitioner did not file his petition for review of that order within 60 days of that date. He did not file his petition for review until December 16, 1996, which was over 90 days after the Board's final order was issued. Thus, the Petitioner's petition for review was untimely, the Court of Appeals lacked jurisdiction over the appeal, and the appeal was properly dismissed.

In *Seaward Marine Services, Inc. v. Director, OWCP*, No. 96-2661, 131 F.3d 136 (Table), 1997 U.S. App. LEXIS 34138 (Text) (4th Cir. Dec. 4, 1997), an ALJ awarded benefits to a claimant under the LHWCA and denied Seaward Marine's application for relief under Section 8(f) of that Act. Seaward Marine then appealed the decision to the Benefits Review Board. Because the appeal had been pending before the Board for over one year as of September 12, 1996, the Benefits Review Board cited Public Law 104-134 and "informed the parties that the ALJ's decision

had been effectively affirmed by the Benefits Review Board on September 12, 1996, for purposes of their rights to obtain review in [the Fourth Circuit Court of Appeals]." *Id.* at *2. Although the Benefits Review Board issued its notice of affirmance on September 12, 1996 and the 60-day appeal period was to expire on November 12, 1996, Seaward Marine did not file its petition for review with the Fourth Circuit until November 13, 1996, "one day outside the applicable sixty-day period." *Id.* at *3. Consequently, the Fourth Circuit held that the petition for review was filed untimely and dismissed the appeal for lack of jurisdiction. *Id.*; *see also Stevedoring Servs. of Am. v. Director, OWCP*, 29 F.3d 513 (9th Cir. 1994) (petition for review filed over 90 days after the issuance of the Board's order was untimely, and the court lacked jurisdiction); *Felt v. Director, OWCP*, 11 F.3d 951 (9th Cir. 1993) (petition for review filed 67 days after the issuance of the Board's order was untimely, and the court lacked jurisdiction); *Adkins v. Director, OWCP*, 889 F.2d 1360 (4th Cir. 1989) (petition for review filed over 60 days after the issuance of the Board's order was untimely, and the court lacked jurisdiction); *Brown v. Director, OWCP*, 864 F.2d 120 (11th Cir. 1989) (petition for review filed 61 days after the issuance of the Board's order was untimely, and the court lacked jurisdiction); *Danko v. Director, OWCP*, 846 F.2d 366 (6th Cir. 1988) (petition for review file stamped 67 days after the issuance of the Board's order was untimely, and the court lacked jurisdiction); *Clay v. Director, OWCP*, 748 F.2d 501 (8th Cir. 1984) (petition for review filed 63 days after the issuance of the Board's order was untimely, and the court lacked jurisdiction); *Pittston Stevedoring Corp. v. Dellaventura*, 544 F.2d 35, 42-44 (2d Cir. 1976), *aff'd on other grounds sub nom. Northeast Marine Terminal Co. v.*

Caputo, 432 U.S. 249 (1977) (petition for review filed over 90 days after the issuance of the Board's order was untimely, and the court lacked jurisdiction). These cases all demonstrate that where, as here, a petitioner does not file his petition for review within 60 days of the Board's final order, the Court of Appeals lacks jurisdiction over the appeal, and the appeal is properly dismissed.

In his Petition for Writ of Certiorari, the Petitioner contends that his appeal to the Court of Appeals was timely filed because the petition for review was filed within 60 days of the Benefits Review Board's Order denying his motion for reconsideration. In other words, he contends that the motion for reconsideration filed with the Board extended the time in which he could file his appeal. However, this contention is meritless. A motion for reconsideration was neither authorized nor permitted under the applicable law and could not extend the appellate deadline in this case.

As noted above, Public Law No. 104-134 amends the LHWCA and alters the provisions of the LHWCA with respect to the finality of decisions. Public Law No. 104-134 does not authorize a motion for reconsideration of the Board's September 12, 1996 order, and in fact the allowance of a motion for reconsideration would flout the very language and purpose of Public Law No. 104-134. That law, which the Petitioner neglects to discuss in the Petition for Writ of Certiorari, clearly anticipates that the September 12, 1996 statutory affirmance will be the final agency action for purposes of an appeal. The law expressly states that any ALJ decision "pending a review by the Benefits Review Board for more than one year shall, if not acted upon by the Board before September 12,

1996, *be considered affirmed by the Benefits Review Board on that date, and shall be considered the final order of the Board for purposes of obtaining a review in the United States courts of appeals.*" The statute could hardly be more explicit. With regard to this case, it requires that the second ALJ's decision be considered affirmed by the Board on September 12, 1996 and that the ALJ's decision be considered the Board's final order *for purposes of appeal*. The Notice of the Clerk of the Board that was issued to all parties on September 12, 1996 also expressly states that the statutory affirmance is the final order of the Board for purposes of an appeal. (App. C, p. 3a). Moreover, the Courts of Appeals have given effect to this statute and have recognized that the statutory affirmance is the "final order of the Board for purposes of obtaining review" in the Courts of Appeals. *See Continental Terminals v. Director, OWCP*, No. 96-4175, 125 F.3d 843 (Table), 1997 U.S. App. LEXIS 28523 (Text), *2 (2d Cir. Oct. 9, 1997); *see also Hall v. Consolidated Employment Sys., Inc.*, 139 F.3d 1025, 1028 n.2 (5th Cir. 1998) (stating that cases pending before the Board for more than a year as of September 12, 1996 "are required to be considered affirmed and final on September 12, 1996 for purposes of judicial review"); *Jones Stevedoring Co. v. Director, OWCP*, 133 F.3d 683, 687 (9th Cir. 1997) (stating that under Public Law 104-134 "the ALJ's decision is deemed the final decision of the Benefits Review Board for purposes of finality" and thus "the ALJ's decision is the final agency decision"). Thus, Public Law No. 104-134 contemplates that the Board's final order in this case was issued on September 12, 1996 and that there would be no further consideration by the Board.

A motion for reconsideration and an extension of time for filing an appeal are also inconsistent with the stated purpose of Public Law No. 104-134. Although the statute describes itself as an "Act making appropriations for fiscal year 1996," it also had as its purpose the reduction of funding to certain government agencies, apparently to help achieve a balanced budget. Public Law No. 104-134, 1996 U.S.C.C.A.N. (110 stat.) 1321, 1321. As a result, the statute expressly reduced the funding available to the Benefits Review Board: "[N]o funds made available by this Act may be used by the Secretary of Labor after September 12, 1996, to review a decision under the Longshore and Harbor Workers' Compensation Act (33 U.S.C. 901 et seq.) that has been appealed and that has been pending before the Benefits Review Board for more than 12 months." In other words, the purpose of Public Law No. 104-134 was specifically to prohibit the Board from taking any action on a case after September 12, 1996 if the case had been pending for more than one year. A motion for reconsideration of such a case requests the Board to engage in the very review that Public Law 104-134 was intended to prohibit. In fact, the recent case of *Director, OWCP, v. Sun Ship, Inc.*, No. 96-3648, 1998 WL 423785, *4 (3d Cir. July 29, 1998), has recognized the purpose and effect of the Appropriations Act and has specifically held that an action taken by the Board after a statutory affirmance under the Appropriations Act is a nullity.

In the present case, the Benefits Review Board itself recognized that Public Law No. 104-134, and the purpose underlying the law, does not permit a motion for reconsideration. In its Order denying the Petitioner's motion for reconsideration, the Board explained that it did "not

have authority to further review this case." (App. D, pp. 9a, 10a). Thus, a request for reconsideration was inappropriate under the circumstances of this case and did not provide the basis for extending the time for appellate review.

The Petitioner's argument that a motion for reconsideration should extend the time for filing an appeal is apparently based at least in part on concerns of judicial economy. The argument is that the time for filing an appeal should not begin to run while the administrative agency may still take action to address those issues that may be raised on appeal to the Courts of Appeals. However, such concerns of judicial economy are not implicated in the present case, because Public Law No. 104-134 requires statutory affirmance of the ALJ's decision and expressly prohibits any further action by the Board. Thus, there can be no reconsideration and there is no need to extend the time for filing an appeal.

Petitioner contends that his motion for reconsideration filed with the Board was properly filed under 20 C.F.R. § 802.407(a). However, that regulation does not and cannot authorize a motion for reconsideration under the facts of this case. Section 802.407 states:

> (a) Any party-in-interest may, within 30 days *from the filing of a decision or non-interlocutory order by a panel or the Board pursuant to § 802.403(b),* request reconsideration of such decision by those members who rendered the decision. The panel of members who heard and decided the appeal will rule on the motion for reconsideration. If any

> member of the original panel is unavailable, the Chairman shall designate a new panel member.

20 C.F.R. § 802.407(a) (emphasis added). As Section 802.407 specifically refers to Section 802.403, it is necessary to consider the pertinent language of that Section as well:

> (a) The Board shall issue written decisions as expeditiously as possible after the completion of review proceedings before the Board. The transmittal of the decision of the Board shall indicate the availability of judicial review of the decision under Section 21(c) of the Longshore and Harbor Workers' Compensation Act when appropriate.
>
> (b) The original of the decision shall be filed with the Clerk of the Board. A copy of the Board's decision shall be sent by certified mail or otherwise presented to all parties to the appeal and the Director. The record on appeal, together with a transcript of any oral proceedings, any briefs or other papers filed with the Board, and a copy of the decision shall be returned to the appropriate district director for filing.

20 C.F.R. § 802.403. These regulations clearly reflect that a motion for reconsideration is authorized only where the members of the Board have rendered a written "decision" on the substantive arguments after reviewing the case. However, in the present case, the Administrative Law Judge's decision denying the modification was affirmed by operation of Public Law 104-134, without any substantive review by the Board and without the rendering or

issuance of any Board decision. Instead, the Clerk of the Board merely sent a Notice to the parties informing them that the Administrative Law Judge's decision was statutorily "affirmed by the Board and [was] considered the final order of the Board for purposes of obtaining a review in the United States courts of appeal." (App. C, p. 3a). There were no panel members who heard and decided the appeal. Thus, Section 802.407(a)'s requirements that the request for reconsideration be directed to "those members who rendered the decision" and that "[t]he panel of members who heard and decided the appeal . . . rule on the motion for reconsideration" make no sense under the facts of this case. In fact, the Board referred to the initial affirmance not as a "decision," but as a "notice." (App. D, p. 9a).

The fact that Section 802.407 does not authorize a motion for reconsideration under the facts of this case is entirely consistent with the language and purpose of Public Law 104-134. As previously mentioned, the Appropriations Act is concerned with curtailing certain government funding, including the elimination of certain funding for the Benefits Review Board. The Act contemplates that the review process before the Board will end as of September 12, 1996. It does not contemplate that thereafter the Board may take any further action on the case, such as a reconsideration.

Even if, for the sake of argument, Section 802.407 were read to purportedly authorize a motion for reconsideration of the statutory affirmance in this case, that Section would be invalid because it would directly conflict with Public Law No. 104-134, a federal statute. As discussed above, the regulation's permission of a motion

for reconsideration would contravene the language and purpose of Public Law No. 104-134. *See, e.g., Brown v. Gardner*, 513 U.S. 115 (1994) (holding a regulation of the Department of Veteran Affairs invalid because it was inconsistent with a federal statute).

Consequently, Section 802.407 did not and could not authorize the Petitioner to file a motion for reconsideration under the facts of this case. Furthermore, that Section did not and could not authorize any extension of time for the Petitioner to file his appeal to the Court of Appeals.

Finally, the Petitioner argues that his motion for reconsideration was somehow authorized and the appeal deadline was thereby extended because he followed the procedures outlined in the pre-printed forms (Notice of Appeal Rights) that were attached to the Board's September 12, 1996 Notice of affirmance and October 22, 1996 Order denying reconsideration. In fact, however, the Petitioner did not follow the instructions of the Clerk of the Board. The Board's September 12, 1996 Notice stated that under Public Law 104-134 the ALJ's "decision pending review by the Benefits Review Board [was] considered the final order of the Board for purposes of obtaining a review in the United States courts of appeal." (App. C, p. 3a). Moreover, in the Notice, the Clerk of the Board expressly stated: "Attached please find an outline of *the procedures for appealing to the courts of appeal.*" (*Id.*) (emphasis added). Thus, in the brief Notice, the Clerk repeatedly indicated that the Petitioner was required to file an appeal directly to the United States Court of Appeals. The pre-printed attachments to the Clerk's Notice were forms that simply contained the instructions on how to proceed with an appeal to the Court of

Appeals. Those forms contained a complete listing of all the federal courts of appeals, their addresses and telephone numbers, and the states over which each court exercised jurisdiction.[2] In addition, the Notice of Appeal Rights attached to the Board's September 12, 1996 Notice of affirmance clearly explained that in an appeal to the Court of Appeals, the petition for review had to be received by the Court within 60 days of September 12, 1996.

Despite these instructions, the Petitioner did not follow the appropriate procedure of appealing to the Court of Appeals within 60 days of the September 12, 1996 Notice, but instead made an unauthorized motion for reconsideration. Furthermore, even after the unauthorized motion for reconsideration was denied, the Petitioner could have timely filed an appeal. The Board's Order denying reconsideration was issued October 22, 1996, a little over one month after the September 12, 1996 affirmance. In that Order, the Board explained that the ALJ's decision had been statutorily affirmed, that a motion for reconsideration was impermissible, and that the Board had no authority to review the case. Nevertheless, the Board stated that the Petitioner could still seek further review with the Court of Appeals. However, instead of quickly filing the petition for review, the

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[2] The lists, which are located on the back of the Notices of Appeal Rights, were not reproduced in Appendices C and D of the Petition for Writ of Certiorari (App. C, pp. 7a-8a; App. D, pp. 13a-14a). Because the lists merely contain well-known factual information, they have not been reproduced as an Appendix to this Brief.

Petitioner delayed approximately another 55 days before filing an untimely petition for review.

The case of *Bolling v. Director, OWCP*, 823 F.2d 165 (6th Cir. 1987), is analogous to the present case and is instructive on the issue of the Court of Appeals' lack of jurisdiction. In that case, the Court of Appeals held that where a petitioner did not timely request reconsideration by the Benefits Review Board, the Motion for Reconsideration "did not toll the time for filing a petition for review in this court." *Id.* at 166. As a result, the Court held that a petition for review filed over 60 days after the Board's original order was untimely and the Court lacked jurisdiction to consider the appeal.

Even if the Petitioner were somehow misled by the attachments to the Board's September 12, 1996 Notice or October 22, 1996 Order, the Courts have uniformly held that such a circumstance does not extend or toll the applicable time period for filing the appeal. They have held that "[t]he policy requiring that appeals be timely taken is so strong that ministerial failures by a clerk cannot be allowed to overcome it." *See, e.g., Stevedoring Servs. of Am. v. Director, OWCP*, 29 F.3d 513, 516 (9th Cir. 1994). Moreover, the courts have held that the doctrines of equitable tolling and excusable neglect are likewise unavailable to extend the period for filing the petition for review. *See, e.g., Felt v. Director, OWCP*, 11 F.3d 951, 952-53 (9th Cir. 1993); *Cooley v. Director, OWCP*, 895 F.2d 1301, 1303 (11th Cir. 1990); *Shendock v. Director, OWCP*, 893 F.2d 1458, 1466 (3d Cir.) (en banc), *cert. denied*, 498 U.S. 826 (1990).

CONCLUSION

In sum, Public Law 104-134 mandated that the ALJ's decision be affirmed as of September 12, 1996 and that the statutory affirmance be the Board's final order for purposes of appeal to the United States Court of Appeals. A motion for reconsideration was neither authorized by Public Law No. 104-134 nor consistent with the language or purpose of that statute, and such a motion could not extend the time for filing an appeal. Although the Petitioner was required to file his petition for review with the Fifth Circuit within 60 days of September 12, 1996, he did not comply with the statutory requirements. Because the Court of Appeals properly determined that it lacked jurisdiction over the appeal and because the Petitioner has failed to demonstrate an important federal question or other compelling interest warranting this Court's exercise of discretionary review, the Petition for Writ of Certiorari should be denied.

For the foregoing reasons, the Respondents respectfully request that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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